

**BEFORE THE DIRECTOR OF THE
DEPARTMENT OF PESTICIDE REGULATION
STATE OF CALIFORNIA**

In the Matter of the Decision of
the Agricultural Commissioner of
the County of Los Angeles
(County File No. 07081038)

Administrative Docket. No. 165

**DIRECTOR'S
DECISION**

**Larry Sweeden
Year Round Landscape Maintenance, Inc.
15189 Sierra Bonita Lane
Chino, California 91710**

Appellant./

Procedural Background

Under Food and Agricultural Code (FAC) section 12999.5 and California Code of Regulations, Title 3, (3 CCR) section 6130, county agricultural commissioners (CACs) may levy a civil penalty up to \$5,000 for certain violations of California's pesticide laws and regulations.

After giving notice of the proposed action and providing a hearing on November 13, 2008, the Los Angeles CAC found that on March 4, 2008 the appellant, Larry Sweeden, committed four violations--FAC section 11701, 3 CCR sections 6702(b)(5), 6738(b)(1)(C), and 6738(c)(1)(C)--and levied a total fine of \$1,050.

The appellant appealed from the commissioner's civil penalty decision to the Director of the Department of Pesticide Regulation (DPR). The Director has jurisdiction in the appeal under FAC section 12999.5.

Standard of Review

The Director decides matters of law using her independent judgment. Matters of law include the meaning and requirements of laws and regulations. For other matters, the Director decides the appeal on the record before the Hearing Officer. In reviewing the commissioner's decision, the Director looks to see if there was substantial evidence, contradicted or uncontradicted, before the Hearing Officer to support the Hearing Officer's findings and the commissioner's decision. The Director notes that witnesses sometimes present contradictory testimony and information; however, issues of witness credibility are the province of the Hearing Officer.

The substantial evidence test requires only enough relevant information and inferences from that information to support a conclusion, even though other conclusions might also have been reached. In making the substantial evidence determination, the Director draws all reasonable inferences from the information in the record to support the findings, and reviews the record in the light most favorable to the commissioner's decision. If the Director finds substantial evidence in the record to support the commissioner's decision, the Director affirms the decision.

Factual Background

On March 4, 2008, CAC inspector Christine Belden observed a pesticide application by an employee using a backpack sprayer. The employee was wearing a short-sleeved shirt and was not wearing gloves or protective eyewear. The inspector learned that the employee was spraying the herbicide Round-up Pro and that the label requires that the applicator wear a long-sleeved shirt, protective eyewear, and chemical resistant gloves. After contacting her office, the inspector also discovered that the business did not have a valid pest control business license.

Relevant Statute and Regulations

FAC section 11701 makes it unlawful for a person to advertise, solicit, or operate as a pest control business unless the person has a valid pest control business license issued by the director.

3 CCR Section 6702 Employer-Employee Responsibilities, in relevant part, reads as follows:

...(b) The employer:
...(5) shall take all reasonable measures to assure that employees handle and use pesticides in accordance with the requirements of law, regulations, and pesticide product labeling requirements.¹

Section 6738(b)(1)(C) requires the employer to assure that employees wear protective eyewear when required by pesticide product labeling or when employees are engaged in application by hand or using hand held equipment (with certain exceptions not relevant to this matter).

Section 6738(c)(1)(C) requires the employer to assure that gloves are worn when

¹ FAC section 11704 requires that persons regularly engaged in the business of maintenance gardening that includes incidental pest control shall be qualified for a pest control business license by DPR after passing a test. This section makes FAC section 11701 clearly applicable to the instant case and requires Appellant to be tested and licensed as a pest control business prior to operating as a pest control business, even if incidental to maintenance.

required by the pesticide product labeling when employees are engaged in application by hand or using hand-held equipment (again with certain irrelevant exceptions).

When levying fines, the CAC must follow the fine guidelines in 3 CCR section 6130. Under section 6130, violations shall be designated as “Class A,” “Class B,” and “Class C.” A “Class A” violation is one which created an actual health or environmental hazard, is a violation of a lawful order of the CAC issued pursuant to FAC sections 11737, 11737.5, 11896, or 11897, or is a repeat of a Class B violation. The fine range for Class A violations is \$700-\$5,000. A “Class B” violation is one that posed a reasonable possibility of creating a health or environmental effect, or is a repeat of a Class C violation. The fine range for Class B violations is \$250-\$1,000. A “Class C” violation is one that is not defined in either Class A or Class B. The fine range for Class C violations is \$50-\$500.

Appellant’s Allegations

The appellant argued that his company was not a pest control company and did not need to be licensed. He further argued that the employee took it on himself to spray a small amount of Roundup in the sidewalk cracks, had been supplied with all the equipment needed, elected not to use the equipment, and, therefore, should have been fined instead of the business.

The Hearing Officer’s Decision

The Hearing Officer found that the evidence and testimony was clear that Year Round Landscape did not possess a valid pest control business license, and that the three pieces of personal protective equipment (PPE) required by regulation and the label (long-sleeved shirt, protective eyewear, and gloves) were not worn. The Hearing Officer addressed the appellant’s allegation that his employee should be responsible for wearing the PPE by pointing out that the employee is not a certified applicator and that his employer is responsible for ensuring that the safety equipment be worn. The Hearing Officer also found that the failure to be properly licensed is properly charged as a Class B violation because it is reasonable to suppose that companies not subject to licensing requirements and continuing education requirements could create environmental or health effects during their operations. The fine was placed at the low range (\$300) and was found to be appropriate. The Hearing Officer found that the PPE violations create a possibility of a health effect sufficient to support Class B violations as well. Again, the fines were each placed at the low end of the range as \$250 per violation, and were found to be appropriate.

The Director’s Analysis

The appellant stipulated that his business was not licensed to conduct pesticide applications and that his employee applied a pesticide in an established residential complex. The testimony of inspector Belden also established that the employee did not wear the proper PPE while making the pesticide application with a backpack sprayer. The evidence supports the fact that the employee was not a certified applicator.

FAC section 11701 is quite clear that it is unlawful to operate as a pest control business unless properly licensed by DPR. The appellant's employee was applying a pesticide in the course of his duties. Year Round Landscape must have a pest control business license prior to applying a pesticide, regardless of the size of the job. Additionally, the employee making the application must comply with the regulations governing the wearing of PPE as well as the product label. The employer is obligated by regulation to ensure that the employee wear the PPE.

It is uncontroverted that the appellant's business was not properly licensed and that he failed to ensure that the employee wear a long-sleeved shirt, protective eyewear, and proper gloves. The violations were properly placed in the Class B category as creating a reasonable possibility of producing a health or environmental effect. Further, the fines were appropriately placed at the low end of the range for Class B violations.

Conclusion

The commissioner's decision that the appellant violated FAC section 11701, and 3 CCR sections 6702(b)(5), 6738(b)(1)(C), and 6738 (c)(1)(C) is supported by substantial evidence. The commissioner's decision to levy a fine of \$1050 is also supported by substantial evidence, and is well within his discretion.

Disposition

The commissioner's decision is affirmed. The commissioner shall notify the appellant how and when to pay the \$1,050 fine.


Larry Sweeden
Year Round Landscape Maintenance, Inc.
Administrative Docket No. 165
Page 5

Judicial Review

Under FAC section 12999.5, the appellant may seek court review of the Director's decision within 30 days of the date of the decision. The appellant must file a petition for writ of mandate with the court and bring the action under Code of Civil Procedure section 1094.5.

**STATE OF CALIFORNIA
DEPARTMENT OF PESTICIDE REGULATION**

Dated: March 2, 2009

By: 
Mary-Ann Warmerdam, Director